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HR Internal Investigations 2025

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Law and Practice

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Clayton Utz

Contents

Clayton Utz has an in-depth knowledge of employment law and is renowned for delivering pragmatic solutions in the context of workplace investigations. With 11 partners and over 65 lawyers, its national team has extensive experience conducting workplace investigations on all types of workplace matters. The firm's experience means it offers a truly integrated perspective of workplace, employment, industrial relations, safety and compensation laws, and can deliver value-for-money services that translates into practical, economic and pragmatic solutions. The team is trained and experienced in trauma-informed and victim-centred investigation practices and has a depth of experience dealing with sexual harassment, bullying, discrimination and conduct matters. It regularly assists clients to undertake and provide advice in relation to investigations and disciplinary processes under relevant codes of conduct, from minor infringements and resolution of personal grievances to the investigation of serious allegations involving corrupt conduct, sexual harassment, bullying, workplace rape and misuse of confidential information.

Authors

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Matt Kelleher has a unique breadth of experience, having worked across the private and public legal sectors at senior executive level and has worked on significant and complex employment and industrial relations matters. He advises both public and private sector clients on all aspects of workplace relations law, has well over a decade of investigations expertise and has comprehensive knowledge and experience of Code investigations and the Commonwealth public sector framework.

Christy Miller has a practice that traverses all aspects of the employment relationship, including developing optimal industrial strategies and advising on a range of contentious matters such as enterprise bargaining negotiations, significant business restructures, sham contracting claims and public interest disclosure/whistle-blower complaint management. With over 20 years' experience, Christy specialises in performance and conduct management, sensitive workplace investigations and complex industrial/employment disputation. She regularly advises on appropriate employment management techniques, management of allegations of workplace bullying and harassment and sensitive terminations of employment. Christy also leads large-scale wage audits, advises on the impact and remediation of underpayments and navigating regulatory oversight.

Jennifer Wyborn is an outstanding employment lawyer and a leader in her field. Her sophisticated management of workplace investigations has brought favourable outcomes for clients in a range of environments, from the private sector and tertiary institutions to the Australia Public Service. Jennifer is available where and when her clients need – for routine, sensitive or strategic matters and when urgent support is critical. Jennifer supports her clients in all aspects of investigations and is renowned for delivering pragmatic solutions – whether it be in high-level planning or resolving individual disputes.

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1. Opening an HR Internal Investigation

1.1 Circumstances

An investigation will be appropriate if the matter:

- involves complex or disputed facts;
- is serious and/or has potential risks to the organisation or individuals involved;
- involves allegations of misconduct that could warrant termination of employment;
- could give rise to a legal risk to the business – eg, work health and safety (WHS) compliance;
- concerns sexual harassment, bullying or discrimination, or other criminal conduct (such as fraud); or
- is required under a workplace policy or enterprise agreement.

The factors relevant to whether an investigation is appropriate and how it is implemented include the:

- nature of the complaint;
- need for regulatory compliance;
- potential legal or reputational risk;
- evidence immediately available (such as video surveillance);
- requirement, if any, to investigate under policies and procedures;
- wishes of the complainant and what they want by way of outcome; or
- existence of extraneous factors, such as cultural sensitivities, impact on victims or third-party involvement.

1.2 Legal Bases

While there is no legislation mandating when an investigation must be carried out, there are circumstances where an investigation may be required to comply with laws, policies, or to mitigate risk including:

- whistle-blowing;
- complaints involving risks to health and safety such as those involving sexual harassment, bullying or harassment, or indicate a hostile work environment; and
- complaints of criminal conduct such as fraud, corruption, money laundering, etc.

Employers should consider if they are required to investigate a matter to comply with a workplace policy, enterprise agreement, or other applicable law.

1.3 Communication Channels

Other than in relation to whistle-blowers (see **8.1 Whistle-Blowing**), there is no formal requirement for an employer to have specific complaints channels (noting that there are obligations to address complaints and identified safety risks).

Depending on the size and nature of the business, it is “best practice” to have a process that will:

- ensure any concerns reported by an employee are confidential, and are only provided to staff who require knowledge to address it;
- ensure that employees who report a concern are protected from victimisation/reprisal action;
- be accessible and understandable;
- clearly explain how the complaint will be handled, and the possible outcomes that may arise;
- ensure that the concern is progressed in an efficient manner; and
- ensure that records in relation to the concern are kept.

A complaints process (including the contact point for an employee to raise a concern) should be documented in the employer's policies and procedures. The relevant contact person may include the employee's manager or supervisor.

Australian public companies and large proprietary companies are required to implement a whistle-blowing policy that complies with the Corporations Act 2001 (Cth) (Corporations Act). A whistle-blowing policy may impact the conduct of certain investigations (see **8.1 Whistle-Blowing**).

1.4 Responsibility

There is no legislation mandating who must conduct an internal investigation. Instead, it is up to the employer to manage an investigation in a way that:

- is effective;
- affords procedural fairness to the participants;
- ensures that the investigation is confidential; and
- addresses legal obligations and mitigates risk.

Workplace policies and procedures often specifically outline the process that will be conducted when a matter is investigated, including who must carry out an investigation. Employers should comply with their policies and procedures.

If an investigation is conducted "in-house", it is best practice for the person/s responsible for investigating to be:

- trained in how to conduct investigations;
- familiar with the employer's policies/procedures;
- senior to the employee against whom a complaint/allegation has been made; and
- objective and impartial (to the extent possible).

This may be an HR representative, a member of the WHS function, or the in-house legal team. It can also be a senior manager or board member, depending on the nature of the matter and the positions/seniority of those involved.

Whether to engage an external investigator may depend on:

- the complexity of the matter;
- whether the investigation needs to be covered by legal professional privilege;
- the seriousness of the alleged conduct;
- the seniority of the employee(s) involved;
- the proximity of the potential investigator to the person(s) involved; and
- the nature of the employer's business and its resources.

In addition, employers should consider if:

- the matter under investigation may result in litigation; or
- the investigation report is relevant to external regulatory action – eg, in relation to breaches of WHS laws.

If so, the employer may wish to engage lawyers to conduct the investigation or to engage specialist investigators in order to establish and maintain legal professional privilege over documents created during the investigation (including the investigation report).

1.5 Obligation to Carry Out an HR Internal Investigation

There is no legislation mandating when an internal investigation must be carried out. However, an investigation is likely to be necessary to evidence compliance with laws, policies or to mitigate risk of:

- whistle-blowing complaints;
- risks to health and safety including where complaints allege sexual harassment, bullying or harassment or may indicate a hostile work environment; and
- criminal conduct such as fraud, corruption, money laundering etc.

Refer to **1.1 Circumstances** for a discussion of where an investigation will be appropriate or necessary.

1.6 Prohibition on Carrying Out an HR Internal Investigation

There are no circumstances in which an internal investigation is specifically prohibited other than:

- in relation to matters covered by a law that prohibits an investigation without the consent of a particular regulatory authority, such as a Crime and Corruption Commission;
- where it would impede an active criminal investigation (usually upon notification by the police not to investigate); or
- where a court or tribunal orders an investigation not be conducted (or an order that so impedes an investigation that it cannot functionally be conducted).

However, after considering the factors referred to in **1.1 Circumstances**, an employer should also consider whether other options to address a matter may be appropriate, such as:

- an informal fact-finding process to obtain further information to identify the true nature of the issues;
- a self-directed resolution – eg, grievance policies may encourage employees to address their concerns at a local level first before it is escalated;
- a mediation, or facilitated discussion – eg, if the grievance is limited to interpersonal issues or conflict, a facilitated discussion between employees may resolve the dispute; or
- if the matter relates to more general concerns, a business may consider undertaking more holistic measures, such as staff surveys, working groups, training or well-being initiatives to address the matter.

1.7 Other Cases

Please refer to **1.1 Circumstances** and **1.6 Prohibition on Carrying Out an HR Internal Investigation**.

2. Initial Steps

2.1 Communication to the Reporter

A reporter's legal right to be informed that an investigation is being opened depends on the type of investigation. An investigation conducted under certain statutory frameworks, for example whistle-blowing legislation, may confer an explicit obligation to inform a reporter.

Workplace policies may also contain a right for the reporter to be notified of an investigation. Employers must comply with any obligation to notify the reporter conferred by policy or statute. Otherwise, the reporter does not have a specific legal right to be informed that an investigation is being conducted.

There are no general requirements around the information to be provided to a reporter or the notice period given to them before an investigation commences. However, employers should always check and comply with applicable policies or legislation.

Even without a legal obligation, it may be advisable to inform the reporter to show the employer is responding to their complaint. When notifying, the employer should ensure it protects witness identities and only shares information necessary to:

- enable the reporter's participation if desired;
- reassure them their concerns are taken seriously;
- help prevent reprisal actions;
- provide the contact point for the investigation; and
- provide details of employee support services.

Employers should consult relevant legislation and policies for specific guidance.

2.2 Communication to the Respondent

A respondent has a general right to be informed that an internal investigation will be opened.

Notifying the respondent is part of an employer's procedural fairness obligations to the respondent as it enables them to respond to the allegations. Employment policies and some legislation governing the type of investigation being conducted will also confer a specific right for the respondent to be informed.

Employers should comply with applicable policies or legislation to determine what information should be provided. Procedural fairness requires informing the respondent of the specific allegation/s being investigated. While no general notice period applies, at least 24 hours' notice is recommended to allow a response and to provide procedural fairness.

It is best practice to notify a respondent of:

- the investigation and specific allegations;
- the investigation timeline;
- relevant policies or laws;
- directions related to the conduct of the respondent during the investigation (eg, a confidentiality direction or a direction not to attend the workplace);
- any rights they may have (eg, to dispute the investigation);
- details of employment support services or other wellbeing support; and
- the investigator and key contact person.

2.3 Communication to Authorities

In some circumstances, there may be a legislative requirement to notify an authority about the content or commencement of an investigation. This includes:

- in some circumstances, reporting suspected misconduct to a financial regulator under the Corporations Act and related legislation;
- reporting significant data breaches under the Privacy Act 1998 (Cth) (Privacy Act) to the Office of the Australian Information Commissioner;
- notifying the WHS regulator of a serious work-related injury, illness or incident under WHS legislation;
- notifying the Commonwealth Ombudsman of a public interest disclosure (PID) investigation under the Public Interest Disclosure Act 2013 (Cth) (PID Act);
- notifying a workers' compensation insurer if the investigation involved a work-related illness or injury; and

- reporting suspected cases of child abuse or neglect to the police under State and Territory legislation.

This is not an exhaustive list, and employers should review any relevant legislation carefully to ensure compliance.

Notifying Police

Depending on the nature of the criminal conduct that may have occurred, the employer may have a legal obligation to report the matter to police or other relevant law enforcement authorities. The relevant authority should be notified of the conduct in question and relevant parties involved to enable appropriate action to be taken.

Where the criminal offence was allegedly committed against the complainant, it may be appropriate to offer to support the complainant to make a report to police and respect their wishes if they choose not to do so (noting that the employer may still need to conduct a workplace investigation even if the employee does not make a police report).

2.4 Confidentiality Agreements and NDAs

Lawful and Reasonable Directions to Maintain Confidentiality

Maintaining confidentiality in an investigation is key to protecting its integrity and the privacy of those involved. It is common practice for employers to give a lawful and reasonable direction to employees participating in an investigation, including the complainant, to keep the matter confidential. If the employee fails to comply with the direction, it may be grounds for the employer to take disciplinary action against the employee.

A confidentiality direction will usually still permit an employee to access support or advice as appropriate.

Confidentiality Agreements and NDAs

A complainant may also be asked to sign a confidentiality agreement or NDA. This is not standard practice and generally a direction to maintain confidentiality would be sufficient. A formal confidentiality agreement or NDA generally only occurs as part of a settlement of a claim.

Such agreements can protect the reputation of the employer but have been criticised by the Australian Human Rights Commission (AHRC) as silencing complainants. The AHRC has issued specific guidance for the use of NDAs and confidentiality terms when settling matters involving allegations of sexual harassment or assault.

Employers should be prepared to negotiate the terms of any proposed confidentiality agreement and consider whether a direction relating to confidentiality is more appropriate.

2.5 Preliminary Investigation and Scope-Setting

Purpose of a Preliminary Investigation

It is common practice to conduct a preliminary investigation to determine:

- whether there is sufficient information to proceed;
- the identity of relevant witnesses;
- whether the alleged misconduct can be addressed via a non-investigative pathway; and
- whether it is necessary to stand down the respondent.

A preliminary assessment can lead to a formal investigation, a non-disciplinary outcome or the complaint being closed.

However, it is not always necessary to conduct a preliminary investigation (eg, where the allegation is serious or the circumstances are clear) unless it is required by a policy and/or workplace instrument.

3. Interviews and Fact-Finding

3.1 Interviewees

Reporter

The purpose of interviews is to gather and test evidence to form a factual finding as to what occurred. However, the reporter is often interviewed first to provide their recollection of events and identify any relevant witnesses.

Witnesses

The investigator will then interview witnesses. There are no rules regarding the number of witnesses who should be interviewed. The key is to gather sufficient credible evidence to determine whether or not the alleged conduct occurred on the balance of probabilities.

Respondent

The respondent is generally interviewed last. To provide procedural fairness, they must be given an opportunity to respond to all the witness evidence and allegations against them.

3.2 Participation

An employee may be reluctant to participate, either as a witness or respondent. In these circumstances, the courts have recognised that an employer can issue a lawful and reasonable direction to the employee to attend an interview. A direction should be provided in writing and specify the purpose of the interview.

However, an employer cannot require an employee to answer a question where the answer would:

- incriminate the person in relation to a criminal offence;
- disclose information the person is legally obliged to keep confidential; or
- disclose information that is subject to legal professional privilege.

An employee does not have a general right against self-incrimination outside criminal matters.

Failure to comply with an employer's direction to participate in an investigation, including by attending an interview, may provide grounds for the employer to take disciplinary action against the employee.

3.3 Format

It is best practice to conduct interviews face-to-face, either in person or if necessary, via a videoconference. This allows the investigator to form a holistic view about the witness' credibility.

Ideally interviews should not be conducted over the telephone, as this prevents the investigator from being able to properly assess the witness' credibility.

3.4 Interviewers

The investigator should conduct the witness interviews. Ideally, the investigator should be:

- trained in conducting workplace investigations or have experience in applying the relevant policies;

- senior to the employee whose conduct is under investigation;
- impartial to the investigation, such as an external investigator;
- trained in trauma-informed approaches to conducting investigations; and
- if the investigation involves sexual harassment, the complainant may also prefer speaking to an investigator of a particular gender, which should be accommodated if possible.

3.5 Neutral Party

There are instances in which it can be helpful for a neutral party to attend as a witness to an interview. This can include where:

- the employee is likely to make complaints about the investigation process;
- there are concerns regarding the employee's conduct towards the investigator;
- the employee has not consented to the interview being recorded and it is necessary for a witness to prepare a detailed file note; or
- the employee has requested that a neutral party attend, including as a reasonable adjustment for a relevant disability.

3.6 Support Person

It is best practice to allow interviewees to bring a support person to an interview, particularly where it may result in disciplinary action or termination of employment. This will reduce several risks, including of workers' compensation claims and of creating a psychosocial hazard.

Under the Fair Work Act 2009 (Cth) (FW Act), a factor in determining whether an employee was unfairly dismissed is if an employer unreasonably refused to allow a respondent to bring a support person to an interview (Section 387). Before interviewing a respondent, the employer should determine if they are entitled to unfair dismissal protections (which is based on their employment period, income and applicable award or enterprise agreement).

An employer's policies or procedures may also entitle a respondent to have a support person present.

3.7 Lawyer

An interviewee should not be denied a support person on the basis that the support person is a lawyer.

While the support person can be a lawyer, an investigator is entitled to insist that any such support person only act in their capacity as a support person, and not as a lawyer or advocate.

3.8 Information

At the start of the interview, the interviewer should explain why the interview is occurring. This may include referring to any prior correspondence confirming the allegations and the purpose of the interview.

If the interview is being recorded, this should also be confirmed. Permission to record the interview may be required in certain jurisdictions.

The interviewer should confirm that the interviewee has been offered the option to have a support person with them. If there is no support person present, the interviewer should ask the interviewee to confirm that they do not need a support person. If a support person is present, the interviewer should ask the support person to confirm they understand their role is to provide support, and not to advocate for the interviewee.

It is best practice for the interviewer to remind interviewees of (and have them agree to) confidentiality obligations and that all persons

involved in the investigation have the right to participate in the investigation without fear of reprisal, and that any retaliatory action taken against anyone for participating in the investigation process may result in disciplinary action, including termination.

At the conclusion of the interview, the interviewer should ask the interviewee if they have any questions and advise on next steps as appropriate.

The interviewer should conclude by reminding the interviewee of:

- confidentiality obligations;
- any applicable employee assistance programme services available; and
- the non-retaliation obligation.

3.9 Stopping the Interview

If an interviewee requests to stop the interview, the investigator should acknowledge and record the request, clarify the reason for the request to stop the interview, and if appropriate offer the interviewee a short break.

The investigator should remind the interviewee of their obligations to co-operate with the employer's investigation.

Should the interviewee maintain their request to stop the interview, the investigator should cease the interview at that time and, depending upon the reason for stopping the interview, obtain advice and reschedule.

If necessary, the employer may issue a lawful and reasonable direction requiring the employee to participate and attend the interview with the investigator.

If an employer directs an employee to continue with an interview, the employer should advise the employee that failure to co-operate may result in disciplinary action being taken, up to and including termination.

3.10 Minutes

In circumstances where the interview is not recorded (see **3.11 Recording**), the investigator or a witness for the investigator should take detailed file notes and a written record of interview should be prepared by the investigator, noting key evidence and matters discussed.

The investigator should inform the interviewee prior to the interview that they will be taking notes and producing a record of interview.

It is best practice to provide the record of interview to the interviewee to review and sign to acknowledge its accuracy. Where the interviewee disagrees with parts of the record of interview, this should be noted.

3.11 Recording

It is best practice to record the interview noting that, depending on the jurisdiction, the interviewee's consent may be required.

The investigator will often arrange for a transcript of the recording to assist with reviewing the evidence.

An interviewee may request a transcript of the interview recording. This should be assessed on a case-by-case basis. For example, is it necessary to maintain the confidential and privileged character (if relevant) of the document.

In addition to the transcript, it can be advisable to provide the audio recording to avoid an allegation that the transcript has been "doctored".

If a transcript is provided, the interviewee should be advised the document is confidential and cannot be shared with any other person. It is not usually appropriate to share the transcript of an interview with other witnesses who are not the interviewee as this will jeopardise the integrity and impartiality of the evidence.

If the interviewee does not consent or refuses to participate without being provided with a transcript, the interviewer or a witness may take manual notes of the interview, as an alternative to audio recording the interview.

3.12 Other Fact-Finding

Apart from interviews, other types of fact-finding may be used in an investigation. These include:

- having participants respond to questions or provide information in writing;
- reviewing of documentary materials; and
- reviewing of data on electronic devices.

The use of any form of fact-finding should be informed by relevant legislation (including whistle-blower, privacy, electronic surveillance and workplace surveillance legislation), the terms of any contract of employment or engagement with any impacted parties, and principles of procedural fairness.

4. Protection of the Parties During an HR Internal Investigation

4.1 Protection of the Reporter

An employer has:

- a duty of care to avoid psychiatric injury to its employees, which includes:
  (a) take timely action in response to workplace complaints and investigations;
  (b) provide reasonable support to employees during a HR internal investigation; and
  (c) preserve confidentiality;
- a duty under WHS legislation to ensure, as far as reasonably practicable, the health and safety of employees; and
- duties under anti-discrimination legislation and the FW Act to ensure that an employee is not discriminated for prescribed reasons.

Measures that the employer may take as best practice, include:

- ensuring adequate support is provided and/or offered to the reporter, which may include access to workplace counselling or employee assistance programmes;
- allowing the reporter to work remotely;
- temporarily or permanently alter work duties of the reporter; and
- remove the reporter from direct reporting lines which include an employee against whom they have made a complaint.

If the employer does not act appropriately, it risks claims that it has not complied with one or more of the duties that it owes to its employees.

4.2 Protection of the Respondent

The employer's duties to the respondent are the same as those owed to the reporter.

Accordingly, the employer should also consider those duties in the context of the respondent in HR internal investigations.

Additionally, suspension from employment may be appropriate in certain circumstances.

A respondent may claim the employer has breached one of its duties to them by taking

certain protective measures. See **4.1 Protection of the Reporter** in relation to the risk of claims.

4.3 Measures Against the Respondent

Depending on the seriousness of the alleged conduct, the employer may suspend the respondent (either with or without pay depending on their employment terms) pending conclusion of the investigation.

The employer may suspend an investigation pursuant to the terms of the employee's contract of employment, an applicable industrial instrument (eg, enterprise agreement) and/or the employer's duty under WHS legislation to maintain a safe working environment. Where an employer suspends an employee pursuant to a right under a contract of employment or industrial instrument, the employer will need to comply with specific terms of the instrument. The right to suspend under WHS legislation is discussed further in response to **4.4 Protection of Other Employees**.

It is generally not recommended that an employer take disciplinary measures (eg, issuing warnings or termination) prior to concluding the investigation as doing so may expose the employer to challenges by the respondent regarding the investigation process.

4.4 Protection of Other Employees

Under state and territory WHS legislation, there is an obligation to, so far as reasonably practicable, ensure the health and safety of workers. Employers must take actions to protect complainants, respondents and witnesses, from physical and psychological harm arising during an investigation, so far as is reasonably practicable.

What is reasonably practicable will require an assessment of the likelihood of the risk arising and the degree of harm that might result. It may be reasonable for the employer to suspend a respondent during an investigation where the alleged conduct poses a risk to other employees.

Other measures that can be taken include those referred to in response to **4.1 Protection of the Reporter**.

If an employer does not take measures to protect other employees, an employer can be found to have breached their duties and may be liable for significant penalties.

5. Procedural Requirements and Proof

5.1 Requirements

Employers should ensure that any investigation is conducted in a reasonable and procedurally fair manner. Procedural deficiencies in an investigation may undermine any subsequent decision-making process and may expose the employer to legal and reputational risk.

The concept of procedural fairness is flexible. However, it generally requires that the individual being investigated be:

- informed of the allegations being made against them; and
- given a reasonable and sufficient opportunity to respond.

Employers will normally be expected to ensure that:

- any allegations are put to the respondent;
- the allegations are described in a way that allows the respondent to properly respond;

- the respondent is given a reasonable opportunity to respond;
- the respondent is allowed to bring a support person to attend any investigation meetings or interviews;
- the investigation is conducted by an impartial investigator;
- no determination is made prior to the conclusion of the investigative process (such that the respondent is given a genuine opportunity to respond and influence any findings);
- those involved are directed to keep the matter confidential;
- information concerning the investigation is only disclosed on a "need to know" basis;
- any applicable employment policies and procedures are followed;
- all relevant evidence is gathered and considered prior to the investigator making their findings; and
- there is a reasonable basis on the evidence before the investigator to make their findings.

The employer should ensure that any specific procedural requirements that apply to an investigation process are followed.

5.2 Internal Regulations

Employers may have workplace policies and procedures that go beyond the requirements described in response to **5.1 Requirements**.

An employer may elect to have more prescriptive processes (for example, relating to timelines or providing rights of review) in an employee's contract of employment, an enterprise agreement or a workplace policy.

However, there are significant risks that can arise if applicable policies and procedures are not followed. It is therefore advisable to avoid overly prescriptive internal policies or procedures. It is also advisable to clarify in any such policies (and contracts where they reference a policy) that they are not incorporated into their employees' employment contracts and do not impose contractual obligations on the employer.

5.3 Burden of Proof

In circumstances where the conduct alleged is being relied upon to terminate employment, the burden of proof rests with the employer.

5.4 Degree of Proof

Employers must generally be satisfied that the alleged misconduct occurred "on the balance of probabilities". This requires the employer to be satisfied that, considering all the evidence, the alleged misconduct is more likely to have occurred than not.

This is referred to as the "Briginshaw principle" (named after the 1938 High Court case of Briginshaw v Briginshaw).

It is important to note that in accordance with this principle an employer requires stronger evidence in circumstances where the alleged misconduct is more serious. While it does not alter the required degree of proof (it is still the balance of probabilities), it may alter the kind of evidence that an employer can reasonably rely on in the circumstances.

6. Conclusion and Outcome of an HR Internal Investigation

6.1 Deciding to End an HR Internal Investigation

There are no specific legislative rules that govern when an investigation must end. In practice, an investigation concludes once the investigator has completed their investigation report and

has provided their findings/conclusions to the decision-maker.

An employer/investigator may also need to consider ending, discontinuing, or suspending an investigation if:

- the employee against whom the complaints have been made has been absent from the employer's workplace for an extended period of time (particularly if they are on sick leave);
- the employment of the complainant or the employee against whom complaints have been made ends before the investigation is concluded (and this significantly impacts the ability to conclude the process); and/or
- a determination is made that the complaints are without merit and investigating them would be an abuse of process.

Any process undertaken by the employer in relation to commencing, undertaking and concluding an internal investigation should be consistent with any workplace policies and industrial instruments that apply.

6.2 Procedure for Ending an HR Internal Investigation

The procedures that follow an internal investigation will depend on:

- the terms of reference for the investigation;
- the employer's policies and procedures relating to workplace investigations; and
- any relevant provisions in an industrial instrument that may apply.

However, in practice, (after completing the steps set out in 6.1 Deciding to End an HR Internal Investigation) the decision-maker will generally:

- send a letter to the complainant and employee against whom the allegation/complaint has been made (subject officer), summarising the allegations/complaints, the findings and the basis for the findings;
- write to witnesses advising them that the investigation has concluded and reminding them of their obligation to maintain confidentiality; and
- implement what measures it considers necessary, including any disciplinary process if relevant.

6.3 Conclusion

There are no specific requirements governing how an investigation must conclude. Instead, how an investigation will be formally concluded is typically outlined in:

- the terms of reference for the investigation; and/or
- the employer's policies and procedures relating to workplace investigations.

Similarly, there are no specific rules governing the form of findings/conclusions. Best practice requires the findings/conclusions of the investigation to be presented in a written investigation report.

This provides the basis on which the investigation findings can be reviewed, agreed to or challenged and ultimately defended.

The form and content of the report will be discussed in **6.4 Reports**.

6.4 Reports

A report should include:

- the terms of reference for the investigation;

- the methodology used during the investigation;
- an explanation of how the employer's policies/procedures have been complied with (including evidence of how this has been achieved);
- the standard of proof against which each of the allegations has been assessed;
- an assessment of witness credibility, if required;
- a summary of each allegation and the relevant evidence;
- the investigator's findings/conclusions and the relevant supporting evidence; and
- a list of or copies of documentary materials received during the investigation (eg, interview transcripts, statements, etc).

An investigation report may also include suggested next steps/recommendations in relation to the specific allegations or to address issues in the workplace more generally.

6.5 Information

There is no legislative right to receive any information flowing from an internal investigation. A right to information may be built into policy or an industrial instrument.

Best practice requires both the complainant and subject officer be informed of the outcome of the investigation. Failing to provide information about the outcome may impact an employer's ability to rely upon it.

The need to communicate the outcome does not mean that the full investigation report must or should be provided to the parties. Instead, the relevant decision-maker should write to the complainant and the subject officer to:

- summarise each allegation/complaint made against the employee;
- outline the finding for each allegation (being substantiated, unsubstantiated or disproven);
- outline the reasons for the findings; and
- communicate next steps.

6.6 Communications to Authorities

An employer may be required to report the outcome to authorities, particularly if the investigation reveals potential criminal conduct or serious breaches of laws.

If an investigation reveals that criminal conduct may have occurred, the employer may have a legal obligation to report the matter to police or other relevant law enforcement authorities. The relevant authority should be notified of the conduct in question and relevant parties to enable appropriate action to be taken.

Various government authorities or regulatory bodies may also be informed as to the outcome of an investigation or may be involved in the investigation process. Such bodies may include:

- Fair Work Ombudsman (FWO);
- Fair Work Commission (FWC);
- Australian Human Rights Commission (AHRC);
- WorkSafe (or other safety regulator);
- Commission for Children and Young People (CCYP);
- Australian Securities and Investments Commission (ASIC); and
- Office of the Australian Information Commissioner (OAIC).

Other industry oversight authorities may also need to be informed if the investigation reveals breaches of industry-specific laws (such as healthcare or finance).

6.7 Other Communications

In order for an outcome to be reached following the conclusion of an investigation, it is necessary for the relevant decision-maker to be provided with a copy of the full report in order to consider the findings, conclusions, recommendations and the basis of those findings.

It is appropriate to inform managers or supervisors of the affected parties (the complainant, the respondent or both) of the outcome, to ensure appropriate action is taken in line with organisational policies and procedures. It is not necessary to provide a copy of the report, however, a concise overview of the findings of fact established during the investigation may be appropriate.

Team members and/or other employees of the organisation, who are not involved in the investigation, generally do not need to be informed as to the outcome of the investigation, particularly if it involves personal or sensitive matters relating to the affected parties.

However, if the investigation was high-profile, impacted the overall work environment and/or the outcome of the investigation will affect the broader team dynamics, a general communication may be appropriate to maintain transparency.

6.8 Disciplinary Measures

Where some or all the allegations have been substantiated, a number of disciplinary measures may be taken (assuming the employee remains in their employment). Some common disciplinary measures include:

- termination of employment;
- demotion (in limited circumstances);
- re-assignment of duties;
- a reprimand/warning; and/or
- counselling.

Below is a non-exhaustive list of factors that may be relevant to determining the appropriate disciplinary sanction:

- seriousness of conduct;
- seniority of the employee;
- service history;
- expressions of remorse and co-operation with investigation process;
- degree of control; and
- internal policies and procedures.

6.9 Other Measures

At the completion of an investigation, employers should consider whether there are any other actions that should be taken. This may be appropriate even where allegation/s have not been substantiated.

For example, it may be that broader cultural issues within the organisation have been identified through the course of the investigation, a series of concerns or complaints have been raised over a period, or behavioural patterns are identified in a particular workplace that require intervention.

Where a cultural issue is widespread, organisation-wide actions may be appropriate.

Where an issue is confined to a specific team or area, targeted local management actions may be more suitable. The intention is to utilise early intervention to prevent similar misconduct from being engaged in. This might include:

- group and/or individual counselling, training and/or mentoring;

- informal or formal performance improvement processes;
- changes to reporting structures, increased levels of supervision; and/or
- alternative dispute resolution.

7. Data Protection

7.1 Collecting Personal Data

An employer can collect personal data for the purposes of an investigation. There are some limitations (applies to companies with turnover of AUD300,000 or more).

Under the Privacy Act, "personal information" must not be collected unless reasonably necessary for the organisation's functions or activities. "Personal information" means information about an identified (or reasonably identifiable) individual, whether it is true or not, and whether it is recorded in a material form or not. Employers must take care to ensure that they are not collecting more information than is reasonably necessary for the purposes of carrying out the investigation.

An employer must not collect "sensitive information" about an individual without consent unless an exception applies. "Sensitive information" includes information about an individual's racial or ethnic origin, political opinions, religious beliefs or affiliations, sexual orientation or practices, criminal record or health information, among other things.

Employers must notify an individual of certain matters at or before, or as soon as practicable after, collecting personal information about the individual, including the purposes of the collection and the consequences for the individual if the information is not collected.

7.2 Specific Rules

Personal information should only be collected by lawful and fair means. Relevant legislation (including whistle-blower, privacy, electronic surveillance and workplace surveillance legislation) applies. For example, consent must generally be obtained before recording a private conversation, such as a phone call.

Other specific rules that apply to the collection of personal data include those set out in **7.1 Collecting Personal Data**.

While there are some rules that must be followed in relation to the use and disclosure of personal information under the Privacy Act, the effect of the "employee records exemption" (detailed in **7.3 Access**) is that the Privacy Act does not apply to an act or practice that is directly related to a current or former employment relationship between an employer and the individual, and an employee record held by the employer in relation to the individual.

7.3 Access

Parties to an investigation do not typically have a right to access personal data collected in the context of that investigation.

The Privacy Act generally does not provide an avenue to request access to information directly related to a current or former employment relationship between the employer and the individual, or an employee record held by the employer in relation to the individual. While the Privacy Act may not apply, the FW Act does allow for an employee to request records on their file, in some circumstances.

If an employee seeks access to information under the Privacy Act or the FW Act, specific

advice will be needed about exceptions that may apply.

8. Special Cases

8.1 Whistle-Blowing

Whistle-blowing protection regimes are contained in Australian legislation, including the Corporations Act and Tax Administration Act 1953 (Cth) (Tax Administration Act).

Disclosable Matters

The whistle-blower protections under the Corporations Act cover disclosures of information which an eligible whistle-blower has reasonable grounds to suspect concerns misconduct, or an improper state of affairs or circumstances, in relation to a regulated entity or a related body corporate. This includes conduct that:

- constitutes an offence against a range of prescribed corporate and financial sector legislation;
- constitutes an offence against any law of the Commonwealth that is punishable by at least 12 months' imprisonment; and/or
- represents a danger to the public or financial system.

The Tax Administration Act also provides protections in relation to disclosures relating to a breach of Australian tax law or tax-related misconduct.

Eligible Whistle-Blowers

Eligible whistle-blowers include current or former officers, employees, suppliers or employees of suppliers, or associates of the regulated entity, and their relatives or dependants.

Eligible Recipients

Eligible recipients include:

- an officer or senior manager of the body corporate or a related body corporate;
- an actuary or auditor of the body corporate or a related body corporate;
- ASIC, Australian Prudential Regulation Authority, or in the case of tax-related misconduct, the Australian Commissioner of Taxation;
- a legal practitioner, for the purposes of obtaining legal advice in relation to the operation of the whistle-blower protections; or
- a person authorised by the body corporate to receive disclosures that may qualify for protection (for example, in its whistle-blower policy).

In limited circumstances, "public interest" or "emergency" disclosures made to journalists or parliamentarians may also attract protection.

Protections

There are two key protections where a disclosable matter is disclosed by an eligible whistle-blower to an eligible recipient.

- Confidentiality of a whistle-blower's identity: The identity of an eligible whistle-blower, or information that is likely to lead to their identification, must not be disclosed without the eligible whistle-blower's consent unless the disclosure is otherwise authorised under the Corporations Act or Tax Administration Act.
- Protection from detriment: It is an offence for a person to engage in conduct (or threaten to engage in conduct) that causes detriment to another person, if the reason for the conduct is that the first person believes or suspects that the other person (or another person) made, may have made, proposes to make,

or could make a disclosure that qualifies for protection.

Breaches of these protections may give rise to significant civil and criminal penalties. Other protections apply, including protection from liability for making a report (although there is no immunity from the consequences of any misconduct revealed by the report), and the ability to seek compensation and other remedies through the courts due to loss, damage or injury suffered because of a disclosure.

Other Whistle-Blower Protection Schemes

Separate protections exist for the disclosure of wrongdoing in the public sector under federal, state and territory-based PID schemes.

8.2 Sexual Harassment and/or Violence

Commonwealth – General Provisions

Section 340 of the FW Act prevents an employer/principal from taking adverse action against an employee/contractor because the person exercises a workplace right.

A person exercises a workplace right if they make a complaint/allegation of sexual harassment. In relation to contractors, that complaint needs to be under a "workplace law". This is a broad term that includes legislation that regulates relationships beyond just employment.

Adverse action can be any form of detrimental treatment or alteration to terms and conditions of engagement.

These provisions provide an avenue for workers to bring a complaint in the FWC where they believe they have suffered sexual harassment and have been treated adversely because they have raised a complaint about it.

Commonwealth – Sex Discrimination Act 1984 (Cth)

Section 47C of the Sex Discrimination Act 1984 (Cth) (SDA) imposes a positive duty on organisations to take reasonable and proportionate measures to eliminate sexual harassment as far as possible.

Section 28A of the SDA states that sexual harassment will occur if:

- the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- engages in other unwelcome conduct of a sexual nature in relation to the person harassed,

in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

Similar provisions are contained in state-based discrimination legislation that prohibits and provides remedies for sexual harassment and sex discrimination.

Workers have a right to bring a claim at both a state and federal level to seek redress for sex discrimination and sexual harassment.

State – WHS Laws

Each state within Australia also has WHS legislation that aims to:

- eliminate risks to health and safety, so far as is reasonably practicable; or
- if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

Regulations extend the obligation of managing the risks to the health and safety of workers from sexual harassment and sex or gender-based harassment.

In addition to the specific workplace protections noted above, criminal sanctions exist for sexual violence.

8.3 Other Forms of Discrimination and/or Harassment

Commonwealth – General Provisions

Please see **8.2 Sexual Harassment and/or Violence** for a summary of the adverse action laws. These can extend to a complaint relating to other forms of discrimination which has resulted in adverse treatment of the person.

Further rights exist for employees to bring a claim in circumstances where they are subject to discrimination by the employer and that discrimination gives rise to adverse action.

Discrimination includes a number of protected attributes such as:

- race;
- colour;
- sex;
- sexual orientation;
- breastfeeding;
- gender identity;
- intersex status;
- age;
- physical or mental disability;
- marital status;
- family or carer's responsibilities;
- subjection to family or domestic violence;
- pregnancy;
- religion;
- political opinion;
- national extraction; and
- social origin.

Discrimination Laws

Separately, federal and state laws exist that prohibit discrimination on the basis of protected attributes in designated areas and provide avenues for individuals to bring complaints of discrimination to seek rectification and a remedy.

The discrimination legislation is not confined to the workplace and prohibits discrimination in many facets of life.

Individuals, including workers, who are subject to discrimination based on a protected attribute can bring a claim before the relevant Australian or State Human Rights Commission seeking redress, which may include removal of any detriment imposed, and/or compensation.

The list of protected attributes that support a claim of discrimination vary from state to state and federally but many include the protected attributes listed above.

8.4 Bullying and/or Mobbing

In Australia, there are a number of specific protections against bullying and harassment. These protections include:

- under the FW Act, a worker can apply to the FWC for an order to stop the alleged bullying. Where an application is made to the FWC, an order may be to prevent further bullying, but no compensation may be ordered;
- the general protections regime under the FW Act prohibits adverse action being taken for making a complaint about bullying or harassment. If a claim is successful, various remedies are available, including uncapped compensation and civil penalties;

- the Work Health and Safety Act 2011 (Cth) (the "WHS Act"), and equivalent state-based legislation, impose a duty to ensure the health and safety of workers so far as reasonably practical, which includes preventing bullying and harassment. Implications can be significant including both criminal and civil penalties; and
- under the SDA, there is a positive duty to take reasonable and proportionate measures to eliminate sexual and sex-based harassment and hostile workplaces.

Bullying is repeated unreasonable behaviour towards a worker that creates a risk to health and safety. However, reasonable management action carried out in a reasonable manner is not bullying.

Sexual harassment occurs when a person makes an unwelcome sexual advance or request for sexual favours or engages in other unwelcome conduct of a sexual nature. There must also be a reasonable expectation that the worker being sexually harassed would be offended, humiliated or intimidated.

8.5 Criminal Cases

Where an investigation concerns allegations that are criminal in nature, employers need to exercise caution, particularly if criminal charges are filed.

There are limited situations where mandatory reporting requirements exist. Employers may have an obligation to report to a regulator in the following (non-exhaustive) circumstances:

- the relevant safety regulator may need to be notified of certain workplace incidents immediately after becoming aware of that incident;
- certain employees in education or health care may be required to report allegations relating to a child having suffered harm as a result of physical injury or sexual abuse; and
- where a breach of privacy legislation occurs, such as an eligible data breach, there may be obligations to notify the regulator.

It is recommended that employers seek specific advice when investigating allegations that are criminal in nature.

Employers should be cautious and ensure that they do not interfere with the criminal investigation in any manner. This includes ensuring that any concurrent internal investigation does not compromise evidence or the legal process. Where there is a criminal investigation underway, this will not preclude the employer from finalising its own investigation, which meets a lower standard of proof as referred to at **5.4 Degree of Proof** above.

Employers may choose to pause or suspend an internal investigation while a criminal matter progresses. This may involve implementing interim measures such as suspending the employee or the reassignment of duties.

Employers should take steps to protect the safety and welfare of other employees if necessary.

8.6 Multi-Jurisdictional HR Internal Investigations

There are no specific restrictions that apply to foreign employers when carrying out internal HR investigations. Similarly, there are no specific restrictions on Australian employers carrying out internal HR Investigations in other jurisdictions.

The only limitations would be in respect of local laws, which would apply equally to local and foreign employers:

- employees should consider that Australian legislation may still be applicable, despite the investigation concerning conduct or matters in another jurisdiction; and
- if there are specific matters that must be addressed or taken into consideration under the other jurisdictions laws.

In particular, the FW Act may apply extraterritorially to:

- employees in other jurisdictions when employed by an "Australian employer"; and
- employees capable of being classified as "Australian-based employees" regardless of whether the employer is an "Australian employer".

In respect of employers who are not Australian employers, determining whether an employee located abroad is in fact an "Australian-based employee" is a factual question with the answer turning on the individual employee's specific circumstances.

Trends and Developments

Contributed by:
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Clayton Utz

Clayton Utz has an in-depth knowledge of employment law and is renowned for delivering pragmatic solutions in the context of workplace investigations. With 11 partners and over 65 lawyers, its national team has extensive experience conducting workplace investigations on all types of workplace matters. The firm's experience means it offers a truly integrated perspective of workplace, employment, industrial relations, safety and compensation laws, and can deliver value-for-money services that translates into practical, economic and pragmatic solutions. The team is trained and experienced in trauma-informed and victim-centred investigation practices and has a depth of experience dealing with sexual harassment, bullying, discrimination and conduct matters. It regularly assists clients to undertake and provide advice in relation to investigations and disciplinary processes under relevant codes of conduct, from minor infringements and resolution of personal grievances to the investigation of serious allegations involving corrupt conduct, sexual harassment, bullying, workplace rape and misuse of confidential information.

Authors

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Allison Shannon has nearly 20 years' experience advising and representing clients in the public and private sector on both contentious and non-contentious employment and industrial relations matters, including unfair dismissals, employment advice and litigation, industrial relations issues and disputes, enterprise bargaining, discrimination and harassment, occupational health and safety and preparing employment and contractor agreements. Allison regularly conducts and/or advises in respect of complex workplace investigations for clients (including in relation to fraud and other misconduct). Allison also has significant experience in advising global companies in respect of all employment-related matters impacting their Australian operations.

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Amanda Lyras has a wealth of experience advising on all aspects of employment law, offering comprehensive counsel across matters ranging from employment contract preparation and negotiation, performance management, managing ill and injured workers, termination or change of employment, harassment and discrimination issues, redundancies and restructures, and compliance with industrial instruments. She regularly advises her clients on workplace investigations, navigating circumstances which are often complex and sensitive. This includes investigations involving senior executives, allegations carrying the potential for significant reputational damage and whistle-blower investigations involving complexities such as anonymous disclosures and confidentiality limitations.

Saul Harben has advised employers throughout Australia for over 25 years on all aspects of employment, industrial relations, discrimination and safety law, providing both strategic and operational advice. Saul regularly advises clients on employment and WHS issues arising in the workplace (including at the board level), with a focus on workplace investigations, psychosocial hazards and defending WHS prosecutions. Saul has a specialised focus on industrial relations and enterprise bargaining including preparing and implementing industrial relations strategies, advising clients in negotiating enterprise agreements, resolving industrial disputes, advising and appearing in litigation before the Fair Work Commission, the Supreme Court and Federal Court.

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Introduction

There have been significant changes to the legislative landscape in Australian employment law in recent years. In terms of managing employees, amendments have (among other things):

- expanded work health and safety laws to require businesses to eliminate or minimise psychosocial risks (ie, hazards that may cause psychological harm arising from, for example, the management of work, the work environment, or workplace interactions or behaviours);
- introduced a positive duty to eliminate sexual harassment and sex-based discrimination which requires employers to take proactive and meaningful action to prevent relevant unlawful conduct from occurring in the workplace or in connection to work; and
- created specific protections for whistle-blowers and requirements for businesses to implement whistle-blower policies.

It is therefore not an understatement to say that employers have more issues than ever to consider when managing their employees and supervising their conduct. Employers are finding themselves conducting investigations more regularly and the investigations that they are conducting are more complex with higher risk.

The purpose of an investigation is to identify relevant facts and form a basis upon which to implement performance management, disciplinary action, or determine whether corrective action needs to be taken, for example in relation to health and safety matters. They are also effective at protecting businesses from legal risk and assist in defending against claims, including certain workers' compensation claims which can be rebutted on the basis that the employer took "reasonable management action in a reasonable way". Finally, if implemented appropriately, investigations can support a sense of organisational justice, give employees confidence in their employer, and promote a positive workplace culture.

However, investigations can be complex, costly, and can create a range of risks if not carried out effectively. Questions employers should ask are the following.

- Is an investigation required or appropriate?
- Should we engage an internal or external investigator?
- How do we ensure procedural fairness and protect the health and safety of those involved?
- How do we maintain legal professional privilege?
- Is there an obligation to maintain confidentiality?

These are critical questions that should be considered before contemplating a workplace investigation to ensure that it is a meaningful process that meets legal obligations and mitigates risk.

Is a Workplace Investigation Required?

Given changes to the law and shifting public sentiment with respect to how employers deal with misconduct and issues in the workplace, it is natural that many employers perceive an investigation to be the "best practice" strategy to address an issue.

Nevertheless, the need or requirement to investigate can be complex. For example, many organisations report feeling "pressure" to investigate every complaint, whereas there are also circumstances where an investigation must be undertaken despite the complainant not wanting

to proceed (such as where there is a serious risk to health and safety).

In addition, even the most well-managed investigations can be complex and can result in:

- workplace disruptions;
- lost time;
- legal risks;
- significant financial expense, particularly if an external investigator is engaged; and
- emotional and professional impacts on complainants, witnesses and subject officers.

Therefore, it is important that before commencing an investigation, employers consider if an investigation is appropriate and what other management options may be available under their policies and procedures and the law, to address a particular complaint or issue. Generally, an investigation will be appropriate if the matter:

- involves complex circumstances or disputed facts;
- is serious (for example, involving sexual harassment, theft or fraud) and/or has potential legal or reputational risks to the organisation or individuals involved;
- involves allegations of misconduct that if substantiated would warrant termination of employment under the employee's contract of employment or the employer's policies; or
- is required to be investigated under a workplace policy or enterprise agreement.

Of course, an investigation will not be appropriate in all circumstances and an employer should consider other options before committing to a potentially long and expensive process, such as:

- an informal fact-finding process to identify the true nature of the issues or concerns;
- self-directed resolution may be appropriate. It is not uncommon for grievance policies to encourage employees to address their concerns at a local level first before the matter is escalated;
- mediation, or a facilitated discussion. For example, if the grievance is limited to interpersonal issues or conflict, a facilitated discussion between the two employees may give them an opportunity to offer their experiences and resolve the dispute; or
- if the matter relates to more general concerns, a business may consider undertaking more holistic measures, such as staff surveys, working groups, training or well-being initiatives to address the matter.

However, if after considering an incident or allegation, an employer has determined that an investigation is warranted, or required, one of the first questions that should be asked is how will the investigation be conducted – will we do it internally, or do we need to engage a third party?

Engaging an Internal or External Investigator

Often a company's board, legal counsel and management will seek the comfort of having an external investigator undertake an investigation. However, whether to engage an internal or external investigator depends on several factors, including:

- the complexity and seriousness of the matter;
- legal professional privilege;
- the relative seniority of the employee(s) involved;
- the proximity of the potential investigator to the person(s) involved and any conflict (or perceived conflict) issues; and
- the nature of the employer's business, including its resources and ability to investigate the matter itself.

Engaging an external investigator can:

- ensure the process is impartial, unbiased, and procedurally fair;
- reduce the risk of actual, or perceived bias;
- increase credibility and objectivity; and
- better consider complex issues that require specific skills or qualifications, for example legal, scientific or forensic qualifications.

However, engaging an external investigator can be expensive and employers must ensure the investigator's independence is respected, and that they do not attempt to influence the investigator's findings.

In contrast, investigating a matter "in-house" means the investigator will be familiar with the business' operations and it is often a less expensive and more efficient option. As such, it may be preferred where the matter is simple and straightforward. However, this risks being, or being seen to be, less impartial or objective, which can increase the risk that an outcome will be disputed. Further, it may also involve a greater likelihood of internal employees having to give evidence in relation to any dispute arising from the matter. This has, in several cases, resulted in the Fair Work Commission (Commission) in particular, criticising HR professionals and managers where an investigation was found to have been conducted poorly.

If an external investigation is warranted, it is important therefore that the terms of reference are clear to avoid the investigation turning into a "commission of inquiry" and going beyond scope.

Conducting a Procedurally Fair Investigation

Providing procedural fairness during an investigation is critical to ensuring the success of the process. Broadly, procedural fairness requires employers and investigators, whether internal or external, to act fairly in their decision-making processes and the procedure followed, as opposed to considering the "fairness" of the outcome. This is a flexible standard that can vary depending on the circumstances of the matter, such as the number of allegations, complexity of the evidence, seriousness of the potential consequences, and the personal circumstances of those involved.

Generally, procedural fairness requires that a person whose rights may be affected by the investigation is:

- informed of the case against them in sufficient detail to enable them to respond; and
- given a reasonable opportunity to answer the case against them and be heard without bias.

There may also be a legal obligation to provide procedural fairness in an employment contract (either express or implied), in a workplace policy which applies to the process, an enterprise agreement or applicable law.

Failing to provide procedural fairness may put the employer in financial, legal and reputational risk, including in relation to:

- injury or illness of an employee and breaches of work health and safety laws;
- workers' compensation insurance claims;
- unfair dismissal or adverse action claims;
- claims for breach of contract or other common law claims;
- industrial disputes; and
- reputational, media and public relations issues.

Importantly, there may be a loss of trust in the process by employees which may lead to additional complaints, issues with morale and a decline in the culture of an organisation.

"Person-Centred and Trauma-Informed" Investigations

While procedural fairness is central to effective workplace investigations, increasingly government bodies, such as the Australian Human Rights Commission (AHRC) which have released relevant guidance material, and others have encouraged a "person-centred and trauma-informed" approach to investigations and interviews, particularly of complainants, but also more generally. The key elements of this approach include:

- flexibility and adaptability – avoiding rigid and structured processes and being open to adapting the setting, location and interview process;
- prioritising empathy and care – ensuring complainants are treated with care and empathy and are provided an opportunity for a support person;
- appropriate language – conducting interviews in an encouraging and empathetic manner; and
- training – ensuring investigators have undertaken trauma-informed workplace investigations training.

The AHRC has acknowledged that a person-centred and trauma-informed approach will look different in each organisation or business. However, employers undoubtedly have an obligation to adopt these practices as, for example, the AHRC has referred to person-centred and trauma-informed processes being one of four "guiding principles" for businesses to meet their positive legal duty to take reasonable steps to eliminate sexual harassment and discrimination in the workplace.

With that said, in practice there can be a genuine tension between providing procedural fairness to a subject officer and conducting a trauma-informed investigation process, for example:

- procedural fairness may require that the subject officer be given the name of the complainant to respond to allegations, but this may be contrary to trauma-informed practices, particularly if the complainant does not want their identity revealed; or
- a trauma-informed approach may prioritise empathy and care by agreeing to interview a complainant over the telephone rather than face-to-face. However, this may undermine procedural fairness as the investigator may be less able to gauge the credibility of the complainant compared to gauging credibility of the subject officer who is typically interviewed in person.

Getting this balance wrong can undermine the investigation, further traumatise the complainant, and expose the employer to legal risk. We have yet to see how the Commission and courts will resolve this tension. However, ultimately, an employer, or decision maker, will need to undertake a very cautious and measured assessment of which approach is the most appropriate in the circumstances and how to structure an investigation accordingly.

Reducing the Risk of Psychosocial Hazards

The emphasis on a "person-centred and trauma-informed" approach to investigations is consistent with a more general recognition in recent years of the risk of psychosocial hazards, which are hazards arising from the design and management of work, the work environment, or work-

place interactions or behaviours, which may cause psychological harm.

Under Australian work, health and safety laws, businesses have a duty to eliminate or minimise, so far as is reasonably practicable, the psychosocial risks that arise from psychosocial hazards. Failing to meet this duty can attract significant penalties.

Investigating and addressing workplace issues such as bullying, harassment, violence and aggression is critical to meeting this obligation. However, businesses should be conscious that investigations themselves, if not conducted properly, can be a psychosocial hazard. For example, in its model code of practice for managing psychosocial hazards at work, SafeWork Australia refers to "poor organisational justice" as a hazard, which may include:

- failing to treat workers' information sensitively or maintain their privacy
- applying disciplinary policies inconsistently or discriminatorily; and
- failing to appropriately address (actual or alleged), inappropriate or harmful behaviour, or misconduct (for example, by not investigating allegations of sexual harassment or not providing procedural fairness for workers who are accused of bullying).

It is therefore incumbent on employers, when investigating workplace issues or allegations to ensure that they consider these potential risks as it will be relevant for meeting their legal obligation to eliminate or minimise such risks so far as reasonably practicable in the workplace generally and specifically with respect to an investigation process.

Maintaining Legal Professional Privilege

Legal professional privilege (LPP) is a protection that ensures that certain documents remain confidential and are not divulged as part of a compulsory disclosure process.

Employers will often engage lawyers to conduct investigations or to engage external investigators under privilege, where the matter:

- could potentially give rise to litigation in the future; or
- the investigation report is relevant to external regulatory action, for example in relation to breaches of work health and safety laws.

The maintenance of privilege is therefore a key consideration in the investigation process as LPP can be waived either expressly (often for strategic reasons) or by acting inconsistently with the maintenance of privilege (noting that workers' compensation legislation in certain Australian jurisdictions has removed the ability to rely on LPP for certain communications including investigation reports).

However, there are a number of issues with maintaining privilege in investigations that are important to appreciate:

- the test of whether LPP applies is determined by considering the purpose of a document at the time it is created and not by reference to its later use. As such, engaging an investigator under privilege is a critical step in establishing LPP over documents created during an investigation;
- if the investigation is required to comply with (or is undertaken in accordance with relevant policies and procedures – eg, a safety policy), it will not be privileged;

- access to an investigation report should be restricted as far as possible and only disclosed on a "need-to-know" basis. However, this can be problematic if an organisation wants to operationalise its findings, or the report must be shared with boards, contractors or other relevant stakeholders;
- if a decision maker's determination is based on the findings of an investigation report it may waive privilege either to provide procedural fairness or because the purpose of the report was the disciplinary process and not to seek legal advice. This may mean a separate document is required for decision-making purposes; and
- often in safety matters, the company's policies or procedures will require the completion of an investigation report and the sharing of findings. This can also be the case in relation to discharging duties in relation to psychosocial hazards such as sexual harassment, bullying and harassment or a hostile work environment. A privileged document may not assist to evidence compliance with these obligations.

Given the importance of LPP in relation to managing legal risk to a business, if there is any doubt it would be prudent to seek advice regarding privilege from legal advisers.

Maintaining Confidentiality

Generally, maintaining confidentiality during an investigation protects the integrity of the process and ensures that witness evidence is genuine and accurate. This is critical given the trend toward defamation proceedings where individuals allege that their reputation has been harmed by a disclosure. It is also important for protecting the interests of the business and the health and well-being of persons involved (for example, in relation to psychosocial hazards).

In certain circumstances there are also legal obligations to maintain confidentiality. The Corporations Act 2001 (Cth) and the Taxation Administration Act 1953 (Cth) contain specific protections for certain whistle-blower disclosures. Under the Corporations Act, a disclosure of information by an individual is protected if, and only if:

- the discloser has reasonable grounds to suspect that the information concerns misconduct, or an improper state of affairs or circumstances, in relation to a regulated entity (or a related body corporate); or
- the discloser has reasonable grounds to suspect that the information indicates that the regulated entity (or an officer or an employee) has engaged in conduct that constitutes an offence against certain legislation.

However, these protections do not apply to a disclosure of information to the extent that the information is a personal work-related grievance, including a grievance about the discloser's employment, or former employment, which only has personal implications for them, and not for the business itself.

There are strict confidentiality obligations that apply to protected whistle-blower disclosures, including prohibitions on the disclosure of the whistle-blower's identity, or identifying information, which attracts criminal and civil penalties. There are certain exemptions including for investigations where:

- the information used in the investigation did not include the whistle-blower's identity;
- the employer took all reasonable steps to reduce the risk that the whistle-blower will be identified from the information used (including removing their name, title, team and using gender-neutral language); and

- it is reasonably necessary to use the information in order to investigate the disclosure.

Outside of whistle-blower protections, the maintenance of strict confidentiality in certain matters has come under scrutiny in recent years. For example, during the Respect@Work National Inquiry, the AHRC heard concerns that confidentiality obligations were being included in sexual harassment settlement agreements to silence and intimidate disclosers, whilst simultaneously protecting the alleged harasser.

In response, the AHRC recommended that when reaching settlement terms those involved should adopt the position that confidentiality clauses should:

- not be seen as standard terms;
- be considered on a case-by-case basis and their scope and duration should be as limited as possible;
- not prevent organisations from addressing systematic harassment issues within the workplace; and
- not undermine the wellbeing of those involved and should be trauma-informed, culturally sensitive and intersectional.

Confidentiality is nevertheless integral to the success of an investigation process. Failing to maintain confidentiality may result in reputation damage, reprisal action, collusion and increase the risk of legal action if the matter is challenged. As such, confidentiality should be central to any investigation process.

Final Comments

Investigations are essential, particularly for dealing with serious workplace matters. However, they can be complex and there are many pitfalls that may appear during the process. These tips and considerations will assist employers who want to ensure that their investigation processes are meaningful, meet their legal obligations and mitigate risk.

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